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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 146

ERNEST W. MATHER, *Petitioner,*

v.

JONATHAN WOODNER COMPANY, A Corporation, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Ernest W. Mather prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled case on January 7, 1954.

OPINIONS BELOW

There was no written opinion in the District Court. The opinion of the Circuit Court of Appeals (R. 124) is reported in 210 F. 2d 868.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 7, 1954. (R. 135) Petition for rehearing was denied on March 19, 1954. (R. 136) The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Whether the full faith and credit clause of the Constitution or any local rule of conflicts of law compels the District of Columbia courts to apply the Maryland Workmen's Compensation Act to bar a suit brought in the District of Columbia against a general contractor for an injury which occurred while the employee was temporarily working in Maryland, such suit having been brought under an integral provision of the District of Columbia Workmen's Compensation Act providing for such third-party action for damages, where:

(a) the employee was resident and hired in the District by a District employer;

(b) where the District of Columbia statute was otherwise clearly applicable so as to enable the employee to seek compensation thereunder if he so chose;

(c) there is no positive assertion of jurisdiction over the injury by the laws of the State of Maryland;

(d) where such a subordination of the compensation law of the District of Columbia and rights preserved thereunder would be a severe limitation of the strongly expressed public policy of the District of Columbia and would work a positive harm on the system of workmen's compensation in force in that jurisdiction in that it would deprive the employers and insurance carriers of any right to indemnification against a third party tortfeasor for compensation paid to such employee.[1]

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[1] While probably not, in itself, of sufficient importance to persuade this Court to grant certiorari, the following question, which is felt to be possibly decisive of this entire controversy, is presented by this petition: Does the Workmen's Compensation Act of Maryland apply to an employee where neither such employee nor his employer are residents of Maryland, and where the contract of employment between them has been entered into in the District of Columbia, and where such employer has furnished workmen's compensation insurance coverage under the workmen's compensa-

STATUTES INVOLVED

The pertinent statutory provisions are printed in Appendix A, infra, pp. 18, 19, 20, and 21.

STATEMENT

This is an action by petitioner, plaintiff below, the employee of a subcontractor, for damages for an injury suffered as the result of the negligence of respondent, defendant below, the principal contractor.

Petitioner, a District of Columbia resident, (R. 9) employed in the District by a District subcontractor, (R. 9) was temporarily assigned to work on a construction project in nearby Maryland. (R. 34)

Plaintiff sued defendant under the District of Columbia Compensation Act (Title 36, Section 501, D. C. Code, 1951 (Appendix A, p. 19, infra), adopts the Longshoremen's and Harbor Workers' Act, Title 33, Chapter 18, U.S.C., as the District Compensation Act). The District Compensation Act declares that "the provisions . . . shall apply in respect to the injury or death of an employee of an employer carrying on any employment in the District of Columbia, irrespective of the place where the injury or death occurs . . ." (Title 36, Section 501, D.C. Code). Section 933(a) of the District Compensation Act provides that a District employee may elect to sue a third party "other than the employer." Section 933(f) provides that a District employee may claim compensation from his employer for any deficiency between the amount recovered in the third-party suit and the amount of compensation payable by the employer under the Act. Plaintiff elected to sue defendant as a third party and to claim compensation under the District Act for the deficiency, if any, and filed notice, as re-

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tion laws of the District of Columbia, so as to cover the employee's employment while in Maryland, and where the extra-territorial provisions of the Maryland Act are recognized in the District of Columbia and where employers and employees covered by the Maryland Act are likewise exempted from the application of Workmen's Compensation Act of the District of Columbia?

quired by the Act, with the District Compensation authorities, that he was pursuing these two remedies under the Act. (R. 4, 5)

The United States Court of Appeals for the District of Columbia Circuit reversed (R. 135) a judgment of the United States District Court for the District of Columbia on a jury verdict in favor of petitioner. (R. 7)

The Court of Appeals held that it was compelled to apply the Maryland Compensation Act giving respondent the status of "employer" of petitioner and barring any suit at common law by petitioner against respondent in whatever jurisdiction brought. (R. 129-134)

The Court held that, looking at the action simply as a tort suit, it must stand or fall by the law of Maryland, (R. 131) relying on the case of *Bagnel* v. *Springfield Sand & Tile Co.*, 144 F. 2d 65, and that under the Maryland Act respondent was the statutory employer of petitioner and that his liability was exclusively limited to the compensation he was required to pay or provide thereunder. (R. 131)

SPECIFICATION OF ERRORS TO BE URGED

1. The Court of Appeals of the District of Columbia Circuit erred in holding that, in a suit for damages brought under the District Compensation Act by an employee residing and hired in the District and injured while temporarily working in Maryland against the general contractor who negligently caused the injury, the courts of the District of Columbia are bound to subordinate the compensation law of that jurisdiction and apply the compensation law of Maryland by reason of either (a) the full faith and credit clause of the Constitution, or (b) any local rule of conflict of laws.

2. The Court of Appeals of the District of Columbia Circuit erred in so interpreting Section 68(3), Article 101, Annotated Code of Maryland, 1951, as to conclude, contrary to the plain meaning of the words of the statute and

the clearly expressed intent of the legislature of Maryland, that a non-resident employee, whose non-resident employer had secured workmen's compensation insurance coverage for him in another state, was not exempted from the application of this Article, the Maryland Compensation Act, when proceedings were taken against the principal contractor in another state.

REASONS FOR GRANTING THE WRIT

1. In adopting the view that it was compelled to apply the compensation statute of Maryland to this suit brought under the District of Columbia Compensation Act, the Court below erred both (A) as to its reasoning with respect to the application of the full faith and credit clause to this case, and (B) in taking as its premise the position that this suit was simply a common-law tort action when, in fact, the suit was predicated precisely and entirely upon the terms of the District of Columbia Compensation Act, having been preceded by the filing of a Notice of Election to Sue and to claim compensation under the District Act for the deficiency, if any.

(A) The following language from the decisions of this Court clearly point up the mistaken view of the Court below with respect to the relation of the full faith and credit clause to the facts of the case at bar.

Where there is a conflict of a right claimed under one statute, which is to prevail only if the opposing statute and right claimed thereunder is to be denied, this Court has declared, in *Alaska Packers Association* v. *Industrial Accident Commission of California, et al.*, 294 U.S. 532 (1935), that:

> ". . . the conflict is to be resolved, not by giving automatic effect to the full faith and credit clause, compelling the courts of each state to subordinate its own statutes to those of the other, but by appraising the governmental interests of each jurisdiction, and turning the scale of decision according to their weight." (p. 547)

That rule was reiterated in the case of *Pacific Employers Insurance Co.* v. *Industrial Accident Commission, et al.*, 306 U.S. 493 (1939), where this Court stated, at p. 502:

> "And in the case of statutes, the extra-state effect of which Congress has not prescribed, as it may under the constitutional provision, we think that the conclusion is unavoidable that the full faith and credit clause does not require one state to substitute for its own statute, applicable to persons and events within it, the conflicting statute of another state, even though that statute is of controlling force in the courts of the state of its enactment with respect to the same persons and events.
>
> "This Court must determine for itself how far the full faith and credit clause compels the qualification or denial of rights asserted under the laws of one state, that of the forum, by the statute of another state."

This salutary rule was expressly applied and followed in the Court below in the case of *United States Casualty Co.* v. *Hoage*, 64 App. D.C. 284, 77 F. 2d 542 (1935).

That the present state of the law is clearly reflected in the above-quoted language of these decisions of this Court has been recognized by eminent writers in this field. (cf., for example, *Goodrich, Handbook of the Conflict of Laws*, 3rd Ed., 1949, pp. 281 and 284.) (also 67 *Harvard Law Review* 1281 commenting on the base at bar.)

It can hardly be argued that the District of Columbia, where the employer and employee resided and did business (R. 28), where the contract of hire was entered into (R. 31) and where petitioner here and his dependents would have become public charges had he been unable to meet the expenses incident to his injury, did not have a governmental interest in this case sufficient to warrant the application of its own compensation statute.

Nevertheless, the Court of Appeals felt that this interest would have to yield when the employee chose to exercise, against a third party, a right of action for damages preserved to him by the District of Columbia statute, in

deference to the comparatively insignificant interest of the State of Maryland in the matter; that, in other words, the courts of the District of Columbia were compelled to apply the compensation law of Maryland in this case. (R. 135)

It is submitted that nowhere in the above-cited decisions is there the slightest justification for this conclusion.

This Court said, in *Magnolia Petroleum Co.* v. *Hunt,* 320 U.S. 430, 437:

> " . . . the state of the employer and the employee is free to apply its own compensation law to the injury of the employee rather than the law of another state where the injury occurred.
>
> " . . . And for like reasons we held also that the state of the place of the injury is free to apply its own law to the exclusion of the law of the state of the employer and employee."

This is not to say that either state is bound to apply either law, *Hynes* v. *Indian Trails,* 181 F. 2d 668, 670. Compensation statutes are not mutually nullifying and exclusive; either may be embraced by the parties, in the absence of a positive assertion of jurisdiction by the state of the place of the accident. *Liberty Mutual Insurance Co.* v. *Goode Construction Co.,* 97 F. Supp. 316, 317.

Maryland has made no such positive assertion. On the contrary, the Maryland Act is limited to hazardous employment and excludes from its purview nonresident employees and employers. (Section 68(3), Article 101, Annotated Code of Maryland, 1951). Clearly, Maryland does not positively require the application of its compensation law to *every* injury suffered by an employee while working in Maryland.

As pointed out above, the District of Columbia had a governmental interest clearly sufficient to support the application of its statute. It has strongly and clearly asserted as its public policy that this interest shall be served by the application of its workmen's compensation

act to injuries or deaths resulting from industrial accidents, "irrespective of the place where the injury or death occurs." (Title 36, Section 501, D.C. Code, 1951.)

There being no constitutional compulsion for the application of the Maryland Compensation Act, it is submitted that the decision below runs contrary to the clearly enunciated doctrine of this Court, that the Court below erred in its construction of the above-quoted decisions of this Court, and in not giving full effect to the compensation law of the District of Columbia, notwithstanding allegedly conflicting statutes of the state of the injury.

(B) The Circuit Court erred in considering this problem as merely a conflict between the common law right of action in tort preserved by the District statute and the exclusive remedy provided by the Maryland Act. The problem here is essentially and fundamentally a conflict of compensation laws.

Admittedly, petitioner here may seek compensation under the District Act (R. 17). By his *Notice of Election To Sue* (Form DCCA-313), which is set out in Appendix A (cf. 20 CFR, Subchap. A., Subpart C., Sec. 01.23), and which petitioner filed in this case, he made "claim for compensation for any deficiency between the amount so recovered and the amount provided by the said Act. . . " The right to sue and the concomitant right to claim compensation for any deficiency are inseparable provisions of the statute.

It is submitted that every reason for allowing petitioner here thus to seek compensation, by deficiency or as such, prompts the recognition and permissibility of this action at law in the courts of the District of Columbia.

The right to proceed at law against third-party tortfeasors is an integral part of the District of Columbia statute. The very section preserving this right for an injured employee or his personal representative, 33 U.S.C. 933, is entitled "*Compensation* for injuries where third persons are liable." (Emphasis supplied.) This is an

indication of the intent of Congress that the third-party right is an essential fixture in the entire scheme of compensation. There is, in Section 933(f), the provision above-referred to whereby, in case of deficiency in the amount recovered as damages, the employer shall be required to pay a sum equal to the excess of the amount which the Secretary determines is payable on account of the injury or death over the amount recovered against such third persons as damages or by way of compromise.

The same result is reached in these cases where a third party is responsible for the injury, even though the avenue for recompense selected by the employee is to seek the compensation provided by the statute. Section 933(b) of Title 33 provides that acceptance of compensation under an award shall operate as an assignment to the employer of all rights of the employee or his representative to recover damages against such third persons. The employer may then, by suit or compromise, recover such damages (933(d)); he is required then to distribute, after certain deductions, including the amount previously paid as compensation, any excess of the damages over the amount of compensation to the employee or his representative.

The sense of these provisions is clear. The workmen's compensation laws were not designed to extend immunity to strangers to the employment contract. The basic concept underlying the third-party right is the simple moral idea that the ultimate loss from wrongdoing should fall upon the wrongdoer. (2 Larson on Workmen's Compensation, Section 71:00 and 71:10.) That was the purpose of petitioner's suit in this case.

A second purpose of these third-party provisions, in addition to placing responsibility to answer in damages where it ultimately belongs, is the quite apparent purpose of allowing an employee, as against a third-party, to effectuate the maximum monetary recovery. The necessity of preserving the social balance in strictly employer-

employee relationships, so well served by workmen's compensation acts, is of no importance or significance here. The third party stands naked of any of the immunity provided by the statute for the employer and the full extent of the employee's injuries is the measure of his recovery.

From this point of view, the cases cited (R.) in support of the conclusion of the Circuit Court that, in an employee-employer suit, if some workmen's compensation act purports to bar the action, that bar will be applied in the forum are meaningless, and the conclusion itself is inapposite to the issues in this case. The cited authorities all involve suits by employees against their *immediate* employers. In none of them is there a question of an employee's rights against third parties. The case at bar is such a third-party suit. *Liberty Mutual Insurance Co.* v. *Goode Construction Co.*, supra, *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85 (1946).

Our frame of reference then is bounded by the compensation laws of the District of Columbia and of Maryland. The frame of reference was completed when petitioner filed his *Notice of Election To Sue*, supra, with the consequent right to claim compensation for any deficiency in his recovery. The Court below was called upon to apply the law of its own jurisdiction. In doing so, it was manifestly incorrect for the Court to look at this suit "simply" as a tort suit. (R.) The suit was not instituted in vacuo, without regard to petitioner's status as one whose injury was covered by the District compensation statute.

2. The importance of the issues involved herein extend far beyond the parties involved in this controversy. The proper decision of these issues is of vital importance, not only to the great number of persons living in the District of Columbia who, in the course of their employment under District employers, leave the confines of the District of Columbia intermittently and temporarily to carry out the duties assigned them in nearby Maryland and Virginia areas, but also to the insurance companies who have pro-

vided the employers of these persons with industrial liability insurance. As will be demonstrated below, if petitioner here is to be deprived of the damages recoverable in an action at law, and is forced to take on the compensation provided by the statute, as a result of the applisation of the bar set out in the Maryland statute, the rights received by way of assignment or subrogation by the employer or insurer, respectively, will likewise be barred by the Maryland statute, thus precluding any indemnification of these parties at the expense of the ultimate wrongdoer. If this is to be the law, insurance companies will perforce give serious consideration to whether they should supply insurance to employers whose employees are sent to bordering states to work with the attendant possibility of no recovery against certain third-party tortfeasors when the injury occurs in such state.

As this Court pointed out in *Cardillo* v. *Liberty Mutual Insurance Co.*, 330 U.S. 469, 476, "The District is relatively quite small in area; many employers carrying on business in the District assign some employees to do work outside the geographical boundaries, especially in nearby Virginia and Maryland areas." It should be noted that this is especially true of persons engaged, as was petitioner here, in the building and construction industry, (R. 10) a hazardous occupation in which the practice of subcontracting is almost universally applied.

3. It is apparent from a consideration of some of the other provisions of Section 933 that the decision below would also preclude petitioner's employer or the insurance carrier from exercising the rights, acquired by assignment or subrogation thereunder (Sec. 933 (b) and (i)) to proceed at law against this general contractor-defendant, if petitioner here is allowed to seek only the compensation provided by the District statute.

The rights assigned or subrogated to the employer or insurance carrier are no better than the rights of the em-

ployee himself, *Doleman* v. *Levine,* 295 U.S. 221 (1935), reversing, 1934, 73 F. 2d 842, 64 App. D.C. 25, *Webster* v. *Clodfelter,* (1942) 130 F. 2d 434, 76 App. D.C. 171, cert. den., 317 U.S. 689, *California Casualty Indemnity Exchange* v. *U.S.* (D.C. Cal., 1947) 74 F. Supp. 401, followed in 74 F. Supp. 411, and if his right is held barred upon the application of the Maryland statute, it would likewise be barred in their hands. This fact brings out boldly the anomalous situation resulting from the decision below.

The employer or insurer is entitled to maintain an action at law for the full recovery of all damages payable to the employee, not for his own enrichment, *Adreance* v. *Lorentzen,* Misc. 1946, 60 N.Y.S. 2d, 834, but for the two-fold purpose of (1) placing responsibility where it ultimately belongs, and (2) securing the maximum recovery for the employee.

The principal contractor is not obligated to secure compensation for the employees of his subcontractors under the District of Columbia statute where the subcontractor himself has secured such compensation. (Section 904(a)).

The effect of the decision below, therefore, is to relieve him of all liability save what might have resulted if petitioner had sought workmen's compensation in Maryland. The Circuit Court of Appeals has recognized that petitioner may seek compensation from his immediate employer (R. 128), but by this decision has left the employer with no recourse against the actual wrongdoer.

The decision, in brief, works a positive harm against the system of workmen's compensation in force in the District of Columbia, for the sake of abiding by a local rule of conflicts of law which, it is submitted, has no place in this proceeding.

If that result is to be avoided, i.e., if such assignees or subrogees are to avoid paying compensation without hope of indemnification, then it must be said that petitioner's only source of redress is compensation as provided by the Maryland statute. Even the Court below recognized

that there is no such compulsion or limitation upon petitioner's rights to compensation.

The unequivocal command of the District Compensation Act, that it shall apply "irrespective of the place where the injury or death occurs" has been consistently followed by the Court below in *Moyer* v. *Cardillo,* 73 App. D.C. 261 (1941), *B. F. Goodrich* v. *Britton,* 78 App. D.C. 221 (1943), *Travelers Insurance Co.* v. *Cardillo,* 78 App. D.C. 392, and by this Court in *Cardillo* v. *Liberty Mutual Insurance Co.,* supra, (1947).

The decision below, therefore, is an implied limitation, if not a reversal of those prior decisions and is in conflict with the decision of this Court in *Cardillo* v. *Liberty Mutual Insurance Co.,* supra, to the extent that the statute may not apply "irrespective of the place where the injury or death occurs" to give effect to the third party rights of the assignees or subrogees of employees who, after injury outside the District, elect to take compensation as provided by the statute.

The result of the decision below, then, is that the actual wrongdoer escapes unscathed at the expense of innocent parties.

The District of Columbia statute, in its entirety, must govern this suit to avoid such a result.

4. It is submitted that the Court below incorrectly cited as authority for the conclusion it reached in the case at bar the case of *Bagnel* v. *Springfield Sand & Tile Co.,* 144 F. 2d 65 (1st Cir. 1944).

There is one key factual difference between that case and the case at bar which renders it inoperative as a precedent here, and that is the fact that the suit was there brought in the state of injury, while in this case suit was brought in the state where the contract of employment was entered into.

The Federal Court, sitting in Massachusetts, reduced the entire question to whether the Massachusetts Compen-

sation Act was applicable to the injury sustained in Massachusetts. It concluded, first, on the basis of the *Pacific Employers Insurance Co.* v. *Industrial Accident Commission* case, supra, that it had no constitutional obligation to apply the New York law, the place of the contract, and subordinate the Massachusetts statute. It concluded, after construing the terms of the Massachusetts Act, that that statute *could* apply. The following language, at page 74 of 144 F. 2d, is particularly significant. "We take it then, that when Bagnel's employer provided insurance under the Massachusetts Act, Bagnel came, *potentially,* within the coverage of that Act while working on the Springfield job." (Emphasis supplied.)

In essence, therefore, the *Bagnel* case stands for nothing more than the proposition announced in the *Pacific Employer's Association* case, supra, namely, that the locus of the injury alone, is enough to support the jurisdiction of the forum state, with the added qualification that, having selected the injury state as his forum, the employee must accept the limitations rightfully imposed by the forum state on the exercise of his rights.

It should be noted that the Court in the *Bagnel* case apparently felt that had he chosen the New York courts as his forum, which he had the right to do, he could have claimed compensation or pursued his common law rights against the subcontractor-defendants. The following language, together with the footnote thereto, at page 68 of 144 F. 2d, seems clear on that point: "It is not claimed that there is anything in the provisions of the New York Workmen's Compensation Law which would take away whatever common law rights of action he might otherwise have against the subcontractors."

The holding of this case can thus be summarized; Bagnel was potentially covered by the Massachusetts Act; if he elected to exercise the third-party rights provided by the Massachusetts Act, he had to meet the preliminary requirements of that statute. In other words, a state having

the right to apply its own workmen's compensation act will also have the right to apply its own third-party practice. *Carrol* v. *Lanzer,* 116 F. Supp. 491, 502; see also 2 *Larson on Workmen's Compensation,* Section 88:23.

It is submitted therefore, that the rule of the Bagnel case does not apply here, and that it contains intimations, at least, that were the facts there parallel to those of this case, the decision reached would have been contrary to the decision reached below.

5. Petitioner is aware of the reluctance of this Court to construe state statutes when the highest court of the state in question has not ruled upon the point at issue. There are, however, two reasons why petitioner respectfully requests that this Court address its attention to the problem of the correct construction of Section 68(3), subdivision 3 of Article 101 of the Annotated Code of Maryland, 1951.

First, the State of Maryland is not within the circuit of the Court of Appeals for the District of Columbia Circuit, so as to incline this Court to regard it as an expert on the law of Maryland, absent any decisions by the courts of that State on the issue to be resolved. *Estate of Spiegel* v. *Commissioner,* 335 U.S. 701. Second, it is submitted that the conclusion of the Court below is so clearly wrong that this Court may properly interpose its construction of the Maryland statute to prevent a manifest injustice.

Section 68(3) is entitled "Definitions". By engrafting on to this section of definitions the proviso of Section 63 of Article 101, that "where compensation is claimed or proceedings are taken against the principal contractor, then, in the application of this Article, reference to the principal contractor shall be substituted for reference to the employer. . . .", the Court below proceeded to "define" the definitions. It is submitted that this forced fusion of these two sections has distorted the intent of the Maryland legislature which is apparent on the face of the statute.

Subdivision 3 of Section 68(3) reads, in pertinent part:

> "An employee and his employer who are not residents of this State and whose contract of hire is entered into in another State shall be exempted from the provisions of this Article . . . if such employer has furnished workmen's compensation insurance coverage under the workmen's compensation or similar laws of such other State. . . ."

By substituting "principal contractor" for "employer" in the above quoted language, as allegedly required by Section 63, the court below induced the following anomalous but inescapable conclusions. (1) The principal contractor becomes the "contract employer" of the employee, that is, a contract of hire must have been entered into between the principal contractor and the employee of the subcontractor, a situation so obviously divorced from reality as to be utterly untenable. (2) That there must be two contracts for every employee, one with his immediate employer and one with the general contractor, a similarly unrealistic interpretation.

The only logical purpose of this language of Section 68(3) is apparent from the words themselves. The Maryland legislature, by requiring that the "employer" have insurance in the other state, wanted to insure that a non-resident employee, otherwise exempt under the statute, would not be left without a compensation remedy in the other state. The purposes of the Legislature are met if the contract employer carries insurance for the benefit of the non-resident employee, as here he did.

Petitioner respectfully requests that this Court refuse to follow the strained interpretation of this language adopted by the Court below and conclude that by the terms of the Maryland Act, petitioner was exempt from the operation of that statute.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

1. Article 101, section 63, Annotated Code of Maryland, 1951.

When any person as a principal contractor, undertakes to execute any work which is a part of his trade, business or occupation which he has contracted to perform and contracts with any other person as subcontractor, for the execution by or under the subcontractor, of the whole or any part of the work undertaken by the principal contractor, the principal contractor shall be liable to pay to any workman employed in the execution of the work any compensation under this Article which he would have been liable to pay if that workman had been immediately employed by him; and where compensation is claimed from or proceedings are taken against the principal contractor, then, in the application of this Article, reference to the principal contractor shall be substituted for reference to the employer, except that the amount of compensation shall be calculated with reference to the earnings of the workman under the employer by whom he is immediately employed.

* * * * *

Article 101, section 68, Annotated Code of Maryland, 1951.

Definitions as used in this Article:

* * * * *

(3) 'Employee' means a person who is engaged in an extra-hazardous employment in the service of an employer, * * *.

An employee and his employer who are not residents of this State and whose contract of hire is entered into in another State shall be exempted from the provisions of this Article while such employee is temporarily or intermittently within this State doing work for such non-resident employer, if such employer has furnished workmen's compensation insurance coverage under the workmen's compensation or similar laws of such other State, so as to cover such employee's employment while in this State; provided, the extra-territorial provisions of this Article are recognized in such State and provided employers and employees who are covered in this State are likewise exempted from the application of the workmen's compensation or similar laws of

such other State. The benefits under the Workmen's Compensation Act or similar laws of such other State shall be the exclusive remedy against such employer for any injury, whether resulting in death or not, received by such employee while working for such employer in this State.

• • • • •

2. Title 36, Sect. 501, D. C. Code, 1951.

"§36-501 (19:11). Longshoremen's and Harbor Worker's Compensation Act made applicable to District of Columbia.

"The provisions of title 33, chapter 18, of the Code of Laws of the United States, including all amendments that may be made thereto after May 17, 1928, shall apply in respect to the injury or death of an employee of an employer carrying on any employment in the District of Columbia, irrespective of the place where the injury or death occurs; except that in applying such provisions the term 'employer' shall be held to mean every person carrying on any employment in the District of Columbia, and the term 'employee' shall be held to mean every employee of any such person. (May 17, 1928, 45 Stat. 600, ch. 612, § 1.)"

3. Longshoremen's and Harbor Workers' Compensation Act (March 4, 1927), c. 509, 44 Stat. 1424.

Section 4, 44 Stat., 1426 (a) (33 U.S.C. 904)

Liability for compensation. (a) Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907, 908, and 909 of this chapter. In the case of an employer who is a subcontractor, the contractor shall be liable for and shall secure the payment of such compensation to employees of the subcontractor unless the subcontractor has secured such payment.

Section 33 (33 U.S.C. 933)

Compensation for injuries where third persons are liable. (a) If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer is liable in damages, he may elect, by giving notice to the deputy commissioner in such manner as the Secretary may provide, to receive such compensation or to recover damages against such third person.

(b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person.

(c) The payment of such compensation into the fund established in section 944 of this chapter shall operate as an assignment to the employer of all right of the legal representative of the deceased (hereinafter referred to as "representative") to recover damages against such third person, whether or not the representative has notified the deputy commissioner of his election.

(d) Such employer on account of such assignment may either institute proceedings for the recovery of such damages or may compromise with such third person either without or after instituting such proceeding.

(e) Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:

(1) The employer shall retain an amount equal to—

(A) the expenses incurred by him in respect to such proceedings or compromise (including a reasonable attorney's fee as determined by the deputy commissioner);

(B) the cost of all benefits actually furnished by him to the employee under section 907;

(C) all amounts paid as compensation;

(D) the present value of all amounts thereafter payable as compensation, such present value to be computed in accordance with a schedule prepared by the Secretary, and the present value of the cost of all benefits thereafter to be furnished under section 907 of this title, to be estimated by the deputy commissioner, and the amounts so computed and estimated to be retained by the employer as a trust fund to pay such compensation and the cost of such benefits as they become due, and to pay any sum finally remaining in excess thereof to the person entitled to compensation or to the representative; and

(2) The employer shall pay any excess to the person entitled to compensation or to the representative.

(f) If the person entitled to compensation or the representative elects to recover damages against such third person and notifies the Secretary of his election and institutes proceedings within the period prescribed in section 913 of this chapter, the employer shall be required to pay as compensation under this chapter a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the amount recovered against such third person.

(g) If a compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled to under this chapter, the employer shall be liable for compensation as determined in subdivision (e) of this section only if such compromise is made with his written approval.

(h) The deputy commissioner may, if the person entitled to compensation under this chapter is a minor, make any election required under subdivision (a) of this section, or may authorize the parent or guardian of the minor to make such election.

(i) Where the employer is insured and the insurance carrier has assumed the payment of the compensation, the insurance carrier shall be subrogated to all the rights of the employer under this section. Mar. 4, 1927, c. 509, § 33, 44 Stat. 1440, as amended June 25, 1938, c. 685, §§ 12, 13, 52 Stat. 1168; 1946 Reorg. Plan No. 2, § 3, eff. July 16, 1946, 11 F.R. 7873, 60 Stat. 1095; 1950 Reorg. Plan No. 19, § 1, eff. May 24, 1950, 15 F.R. 3178, 64 Stat. .....

4. Notice of Election to Sue.

FORM DCCA-313

DISTRICT OF COLUMBIA WORKMEN'S COMPENSATION ACT

OFFICE OF DEPUTY COMMISSIONER

WASHINGTON, D. C.

NOTICE OF ELECTION TO SUE
(Disability or Death Claim)

(To be submitted in duplicate to Deputy Commissioner)

1. Name of employer:	Colonial Electric Company
2. Office address:	925 New York Avenue, N. W.
3. Name of injured or deceased:	Earnest W. Mather
4. Address:	1116 F Street, N. E., Washington, D. C.
5. Date of accident:	Feb. 20, 1950 — Date Disability Began or Death Resulted: Feb. 20, 1950
6. Place of accident:	University Lane & Colesville Road
7. Average daily wage:	$14.00 a day
8. Cause of accident:	Pole fell with Mr. Mather throwing him to asphalt street.
9. Nature of injury:	Comminuted fracture of the right patella, or knee cap, and a comminuted fracture of the lower end of the left tibia.
10. Name of attending physician:	Dr. Allen Lloyd
11. Address:	1822 R Street, N. W., Washington, D. C.

12. I, or the undersigned, hereby elect under section 33 of the Longshoremen's and Harbor Compensation Act to pursue my remedy against a third party, to wit; JONATHAN WOODNER COMPANY, INCORPORATED, but make claim for compensation for any deficiency between the amount so recovered and the amount provided by the said act, and in support of my claim make the foregoing statement of fact.

My attorney's name is Lubar, O'Keefe, Friedlander & Melrod
200 Woodward Building, Washington, D. C.

Dated: March 24, 1950

/s/ Ernest W. Mather 1116 F Street N. E., Washington, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 146

ERNEST W. MATHER, *Petitioner*,

v.

JONATHAN WOODNER COMPANY, *Respondent*.

BRIEF OF RESPONDENT, JONATHAN WOODNER COMPANY, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

RESPONDENT'S COUNTERSTATEMENT OF THE CASE

For convenience, the petitioner will be described in this Brief as the plaintiff, and the respondent as the defendant. On the day of his injury, the plaintiff was working as an electrician on a large construction project in Prince Georges County, Maryland. The defendant, Jonathan Woodner Company was the principal contractor. Colonial Electric Company was the electrical subcontractor, and the plaintiff's immediate employer. The plaintiff claimed that he was injured when an electric pole which he had climbed fell as a result of the defendant's negligence in undermining the pole in the course of grading work. (R. 2-3).

The defendant was required by law to procure, and had procured and paid premiums upon, a policy of workmen's compensation insurance covering its operations in Maryland, by the terms of which employees of subcontractors were covered. (R. 121-123). The plaintiff's immediate employer, Colonial Electric Company, also carried workmen's compensation insurance for its employees working in Maryland, and, in addition, carried insurance for the same purpose under the laws of the District of Columbia. (R. 79-80).

There is confusion in the evidence as to the place of the plaintiff's employment. (R. 69-72; 9). However, this case was argued and decided in the courts below upon an assumption that the plaintiff's original contract of employment by Colonial was made in the District of Columbia, and that he was sent by Colonial to Maryland to work on the defendant's project. But it is undisputed that there was no contact whatever between the plaintiff and the defendant except as a result of his being engaged in work on the project in Maryland.

It is acknowledged by both parties that the plaintiff could not maintain an action at law in Maryland for damages against the defendant. Under the law of Maryland, both by provisions of statute and decisions of the Court of Appeals of Maryland, a principal contractor is regarded as the employer of employees of subcontractors. Article 101, Sec. 63, Annotated Code of Maryland, 1951. *State* v. *Bennett Building Co.*, 154 Md. 159, 140 A. 52; *Long Co.* v. *State Accident Fund*, 156 Md. 639, 144 A. 775; *Hurt* v. *Casualty Ins. Co.*, 175 Md. 403, 2 A. 2d 402. See also *Standard Accident Ins. Co.* v. *Pennsylvania Car Co.*, 49 F. 2d 73; *Anderson* v. *Sanderson & Porter*, 146 F. 2d 58. The defendant, having complied with the Maryland Workmen's Compensation Act, is entitled to the benefits of the exclusive-remedy provisions of that Act. Art. 101, Sec. 14, Annotated Code of Maryland, 1951.

Counsel for plaintiff argued in the trial court, and the trial court held, that the plaintiff was not barred by the

Maryland law, but was entitled to maintain his action in the District of Columbia against the defendant principal contractor. He contended, and the trial court held, that since plaintiff was originally employed by Colonial Electric Company in the District of Columbia, the only Workmen's Compensation Act applicable is that of the District of Columbia, and the trial court held by that act (33 U.S. Code, Sec. 933) an action against defendant principal contractor as a "third person" was not barred.

The United States Court of Appeals for the District of Columbia Circuit reversed the judgment of the trial court. It declined to decide whether the action would lie under the Workmen's Compensation Act for the District of Columbia; and it declined to rest its decision upon the full faith and credit clause, although suggesting that the Constitution might bind it to apply the Maryland law. On the contrary, the court decided the case on a principle of conflicts of law, in which it has the power to choose whether to apply, or not to apply, the Maryland law. It held that as the District of Columbia has no legislative or judicial policy against application of the bar of the Maryland Act, that bar should prevail. It recognized the sensible balance provided in the Maryland Act whereby both the employer and the principal contractor each gave up rights to acquire others.

QUESTION INVOLVED ON PETITION FOR WRIT OF CERTIORARI

For the purpose of the action of this Court upon the petition in the case at bar, the question involved is better stated as follows: Where an employee of a subcontractor suffers an accidental injury on a construction project in progress in the State of Maryland; and where the principal contractor has never had any contact with the injured employee except in that State; and where by the Workmen's Compensation Act of that state the principal contractor is deemed to be the statutory employer of all workmen on the job, including the employees of subcontractors and makes the right to workmen's compensation the

exclusive remedy of the employee against the principal contractor; and where the Maryland statute also expressly provides that a non-resident employee may have workmen's compensation under the laws of the place where he was employed, on condition that in such case his right to workmen's compensation shall be his exclusive remedy, will the Supreme Court of the United States grant a review of a decision of the highest Court of the District of Columbia that there is no policy under the law of the District of Columbia which inhibits application of the Maryland law?

ARGUMENT

The Decision of the Court Below Decides Local Law of the District of Columbia

This court will not review decisions of the United States Court of Appeals for the District of Columbia Circuit which merely declare the local law of the District of Columbia. *District of Columbia* v. *Pace,* 320 U. S. 698, 64 S. Ct. 406, 88 L. ed. 408; *Del Vecchio* v. *Bowers,* 296 U. S. 280, 56 S. Ct. 190, 80 L. ed. 229. Each state, subject to the provisions of the full faith and credit clause of the Constitution is entitled to decide for itself the rule of conflict of laws to be applied within its jurisdiction. *Finney* v. *Guy,* 189 U. S. 335, 23 S. Ct. 558, 47 L. ed. 839; *Magnolia Petroleum Co.* v. *Hunt,* 320 U. S. 430, 64 S. Ct. 208, 88 L. ed. 149. It is the duty of a Federal court to apply the rules of conflict of laws of the state where the litigation occurs. *Klaxton Co.* v. *Stentor Electric Manufacturing Co.,* 313 U. S. 487, 61 S. Ct. 1020, 85 L. ed. 1477. Since the court below merely decided what rule of conflict of law was applicable within the District of Columbia, it has decided a mere matter of local law. It is clearly in accord with its own previous decisions as the highest court of the District of Columbia. *Giddings* v. *Zellan,* 160 F. 2d 585, 82 U. S. App. D. C. 92; *Rubenstein* v. *Williams,* 61 F. 2d 575, 61 App. D. C. 266; *Paxon* v. *Davis,* 65 F. 2d 492, 62 App. D. C. 146. The same rule is recognized and applied

by this Court as the general rule. *Western Union Tel. Co.* v. *Brown*, 234 U. S. 542, 34 S. Ct. 955, 58 L. ed. 1457, 1457.

The plaintiff has sought to avoid the effect of the Maryland Bar against his maintaining this action by asserting that Section 33 of the Workmen's Compensation Law of the District of Columbia (33 U.S.C. 933) *gives* him a right of action in tort against a "third person". In so doing, he ignores the decisions of the United States Court of Appeals for the District of Columbia which expressly hold to the contrary, i.e., that the Workmen's Compensation Act merely preserves to him his common-law action in tort against third parties if he elects to pursue that remedy, but gives him no new rights against such parties. *Webster* v. *Clodfelter*, 130 F. 2d 434, 76 U. S. App. D. C. 171. *Chapman* v. *Griffiths Consumers Co.*, 107 F. 2d 263, 71 App. D. C. 64.

The Decision of the Court Below Is Not in Conflict With Decisions of Other Circuits

In *Bagnel* v. *Springfield Sand & Gravel Co.*, 144 F. 2d 65, the United States Court of Appeals for the First Circuit applied the same rule as that applied in the case at bar. Neither the court below nor counsel for the parties hereto have found any federal case in conflict. Accordingly, there is no basis for the granting of a review by this court arising from any asserted conflict among the circuits. This Court denied certiorari in the *Bagnel* case, 323 U.S. 735, 65 S. Ct. 72, 89 L. ed. 589.

There is no Constitutional Question

Without deciding that it was bound by the Constitution to do so, the court below gave full faith and credit to the laws of the State of Maryland. Therefore, the case at bar cannot involve a denial of any claimed constitutional right of the plaintiff to have the courts of the District of Columbia give full faith and credit to the laws of another state. This is not contrary to, but in accord with, decisions of this Court which hold that the full faith and credit clause of the Constitution permits the law of the place

where an injury occurs to be applied by the courts of the forum, but does not require the application of the foreign law where a public policy, expressed in the statutory or common law of the state of the forum, is contrary to, and stronger than, the law of the place where the injury occurred. *Hughes* v. *Fetter,* 341 U. S. 609, 71 S. Ct. 980, 95 L. ed. 1212; *Pacific Employers Ins. Co.* v. *Industrial Acc. Commission,* 306 U. S. 493, 83, 57 S. Ct. 429, 83 L. ed. 940; *Bradford Electric Co.* v. *Clapper,* 286 U. S. 145, 52 S. Ct. 571, 76 L. ed. 1026.

The Decision of the Court Below is Sound, Fair and Practicable

The plaintiff has a right to workmen's compensation in Maryland in a proceeding against the defendant, Jonathan Woodner Company. He also has a right to workmen's compensation in Maryland in a proceeding against his immediate employer, Colonial Electric Co. He also has a right to workmen's compensation in a proceeding in the District of Columbia against his immediate employer, Colonial Electric Company. Under the law of the District of Columbia, the defendant, Jonathan Woodner Co., would also be at least secondarily liable to provide workmen's compensation benefits to the plaintiff. 33 U. S. Code 904a. In any event, it is clear that Jonathan Woodner Company has paid insurance premiums to guarantee to the plaintiff workmen's compensation in accordance with the provisions of the Maryland Act. It certainly makes good common sense, and is good public policy, that in exchange for providing all this security, those who are required to provide it should have the benefit of the statutory freedom from an action in tort for damages.

Accordingly, it is respectfully submitted that the petitioner has not made out a case which justifies review by

this Court, and the petition for a writ of certiorari should be denied.

Respectfully submitted,

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